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No. 89-839

In The

Supreme Court of the United States

October Term, 1989

STATE OF ARIZONA,

Petitioner,

-vs-

ORESTE C. FULMINANTE,

Respondent.

On Writ Of Certiorari To The
Arizona Supreme Court

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Arizona Supreme Court err in failing to apply the totality of circumstances test in determining whether Fulminante's confession to an inmate informant was made voluntarily, and did the court err in holding that admission in evidence of Fulminante's confession violated his right to due process under the Fifth and Fourteenth Amendments of the United States Constitution on the ground that the confession was coerced by the inmate informant's implied promise to protect Fulminante from other inmates who were subjecting him to rough treatment, where Fulminante never expressed any fear of the other inmates and never sought the inmate informant's protection?

2. Can the erroneous admission of an involuntary confession be subject to a harmless-error analysis in a case where there is overwhelming evidence of guilt, including a second voluntary confession, and where there has been no especially egregious misconduct by law enforcement officials?

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The Arizona Supreme Court's opinion holding that Fulminante's confession to an inmate informant was involuntary, but that its admission was harmless error beyond a reasonable doubt, is reported at 161 Ariz. 237, 778 P.2d 602 (1988).

The Arizona Supreme Court's supplemental opinion holding that federal constitutional law precluded it from finding admission of Fulminante's involuntary confession to an inmate informant to be harmless error is reported at 161 Ariz. 261, 778 P.2d 626 (1989).

STATEMENT OF JURISDICTION

Arizona asks this Court to review the opinions of the Arizona Supreme Court that were entered on June 16, 1988, and July 11, 1989. The Arizona Supreme Court denied the state's motion for reconsideration on September 19, 1989. The state sought a writ of certiorari on November 17, 1989. This Court granted the petition on March 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself,

nor be deprived of life, liberty, or property, without due process of law; . . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]o state . . . shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

A. The Murder of Jeneane Hunt.

In the early morning hours of September 16, 1982, Richard Lence discovered the mutilated, partially decomposed body of a young girl in the desert area outside Mesa, Arizona. [R.T. of Dec. 16, 1985 (Trial) Vol. 9 at 4-5.] The girl's jeans were unzipped, and had been pulled down over her buttocks. A cloth ligature, or garment rag, was tied around her neck. [R.T. of Dec. 9, 1985 (Trial) Vol. 4 at 20-21, 24-26.]

An autopsy of the girl's body revealed that she died after being shot twice in the head at close range by a large caliber weapon, such as a .357 revolver. [R.T. of Dec. 16, 1985 (Trial) Vol. 9 at 48-59, 70.] Although the ligature around the girl's neck did not contribute to her death, it could have been used to effect non-fatal choking prior to her death. [J.A. at 187; R.T. of Dec. 16, 1985 (Trial) Vol. 9 at 63.]

The body was identified as that of Jeneane Hunt, Fulminante's 11-year-old stepdaughter. [R.T. of Dec. 9,

1985 (Trial) Vol. 4 at 58.] Fulminante had been taking care of Jeneane from September 7-14, while his wife, Mary, was in the hospital for surgery. [R.T. of Dec. 17, 1985 (Trial) Vol. 10 at 15.] Fulminante had telephoned the Mesa Police Department at 1:49 a.m. on September 14 to report that Jeneane was missing. [R.T. of Dec. 9, 1985 (Trial) Vol. 4 at 39.] When Mary returned from the hospital on September 14, she found that Fulminante's .357 Dan Wesson revolver was missing from their bedroom. [R.T. of Dec. 17, 1985 (Trial) Vol. 10 at 25.]

After the discovery of Jeneane's body, Mary told Mesa police that Fulminante and Jeneane had not gotten along with each other, and that there had been a lot of fighting in the Fulminante home. (*Id.* at 14.) On one occasion, Fulminante spanked Jeneane so hard with a "spanking board" that he bruised her buttocks. The police investigated the incident and questioned Fulminante about it. Fulminante later told Mary that he would "get even" with Jeneane, and threatened to "kill her fucking ass." (*Id.* at 19-21.)

During their investigation, the police found out that Fulminante traded a rifle for an extra barrel for his .357 Dan Wesson revolver the day before Jeneane's disappearance. [R.T. of Dec. 16, 1985 (Trial) Vol. 9 at 42-43.] Fulminante had previously told Mary that a person who wanted to kill someone could switch barrels on a .357 Dan Wesson. He described it as a good way to commit a crime "because then the ballistics would be hard to make and it's an easy switch." [R.T. of Dec. 17, 1985 (Trial) Vol. 10 at 24.] Based on Fulminante's actions in purchasing the interchangeable barrel for his revolver, and his numerous inconsistent statements to the police regarding Jeneane's

disappearance, Fulminante became a suspect in Jeneane's murder. [R.T. of Dec. 10, 1985 (Trial) Vol. 5 at 47, 60-62.]

B. Fulminante's Confessions.

In mid-September of 1983, Anthony Sarivola was an inmate at Raybrook Federal Correctional Institution in New York. (J.A. at 77.) Sarivola had been involved with organized crime for a number of years, and had been sentenced to 60 days in Raybrook following a conviction for extortion. (J.A. at 75, 77.)

Before he went to Raybrook, Sarivola arranged a meeting with Agent Walter Ticano of the Federal Bureau of Investigation. As a result of that meeting, Sarivola became a paid informant for the F.B.I. in matters relating to organized crime in the Brooklyn, New York City area. (J.A. at 76.) While serving his prison term at Raybrook, Sarivola masqueraded as an organized crime figure. (J.A. at 78.)

On his eighth day at Raybrook, Sarivola met Fulminante, who was serving time in Raybrook for possession of a firearm by a felon. [J.A. at 77-78; R.T. of Dec. 10, 1985 (Trial) Vol. 5 at 73.] Sarivola and Fulminante became friends while they were in prison together. Because they were only locked down at night, they were free to walk around the prison and talk during the day. (J.A. at 77, 80.)

After he met Fulminante, Sarivola heard a rumor that Fulminante was being investigated for killing his stepdaughter in Arizona. (J.A. at 80-81.) Sarivola and Fulminante had several conversations about Jeneane's death. At first, Fulminante denied to Sarivola that he had killed

Jeneane. He said that she had been killed by bikers looking for drugs. On another occasion, he said that he did not know what had happened. (J.A. at 81.) Sarivola reported the rumors to Agent Ticano, who indicated he should find out more about it. (J.A. at 81-82.)

Sarivola's opportunity to find out more about Jeneane's murder arose one evening when the two men were walking around the prison track together. Fulminante had been receiving "tough treatment and whatnot" from the other inmates, so Sarivola told Fulminante that he had to tell him the truth about Jeneane's death in order for Sarivola to give him any help. (J.A. at 82-83.) Fulminante then admitted to Sarivola that he took Jeneane out to the desert on his motorcycle, and that he killed her by shooting her two times in the head with his .357 revolver. (J.A. at 83-84.) Fulminante said he did it because Jeneane "was a little bitch and she was always in his way with his wife." (J.A. at 83.) Fulminante told Sarivola that he choked Jeneane and made her beg a little before shooting her. He also said that he forced Jeneane to perform oral sex on him. (J.A. at 84-85.)

When Fulminante was released from prison in May of 1984, Sarivola and his fiancee, Donna,[1] picked up Fulminante at the bus terminal. (J.A. at 91, 166.) Donna Sarivola asked Fulminante if he had any relatives he wanted to go see after getting out of prison. Fulminante told Donna Sarivola that he could not go back to Arizona

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[1] Donna and Anthony Sarivola were married in June of 1984. (J.A. at 111.) For purposes of clarification, Anthony Sarivola will be referred to as "Sarivola," and his wife will be referred to as "Donna Sarivola" in petitioner's brief.

because he had killed a little girl there. (J.A. at 167-68.) Fulminante boasted that one day he was going to make it his business to go back to Arizona so that he could "piss on her grave." (J.A. at 168.) Fulminante told Donna Sarivola that he had taken the little girl out into the desert where he raped, beat, and choked her before shooting her in the head. (J.A. at 168.) Fulminante also said he made the little girl beg before he shot her. Fulminante referred to the victim as "the fucking little kid that had got in the way of him and his wife." (J.A. at 169.)

C. Fulminante's Murder Trial.

Fulminante was charged by indictment filed September 4, 1984, with the first-degree murder of Jeneane Hunt. (J.A. at 2.) Prior to trial, Fulminante filed a motion to suppress the confession he made to Sarivola while in prison, and the confession he made to Donna Sarivola following his release from prison. (J.A. at 3.) Fulminante claimed that his confession to Sarivola was not voluntarily made because it was coerced by Sarivola's promise to protect him from other inmates.[2] (J.A. at 7-8.) Fulminante sought to suppress his confession to Donna Sarivola on the ground that it was the "fruit"[3] of Sarivola's previous violation of his constitutional rights. (J.A. at 6-7.)

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[2] Fulminante also claimed that Sarivola violated his Fifth Amendment rights by subjecting him to custodial interrogation without first advising him of his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] *See Wong Sun v. United States*, 371 U.S. 471 (1963).

Pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964), the trial court conducted a hearing outside the presence of the jury on Fulminante's motion to suppress his confessions. (J.A. at 30-42.) Neither party presented any evidence at the voluntariness/suppression hearing. Instead, for purposes of arguing the voluntariness issue, Fulminante adopted the recitation of facts set forth by the state in its response to the motion to suppress. (J.A. at 10, 30-31.)

After listening to lengthy arguments by both the prosecutor and defense counsel, the trial court denied Fulminante's motion to suppress his confessions to Sarivola and Donna Sarivola. (J.A. at 43.) The trial court made a specific finding that Fulminante's confessions were voluntary. (J.A. at 63.) The state subsequently introduced both confessions in evidence in its case-in-chief. (J.A. at 83-85, 168-69.)

Fulminante was convicted of first-degree murder. [R.T. of Dec. 19, 1985 (Trial) Vol. 12 at 3.] The court found that the murder was especially heinous, cruel, and depraved, and imposed the death penalty. [R.T. of Feb. 11, 1986 (Sentencing) at 8-17.]

D. Fulminante's Appeal.

Fulminante's appeal to the Arizona Supreme Court was automatic. Rule 31.2(b), Ariz. R. Crim. P. Initially, that court affirmed Fulminante's conviction. *State v. Fulminante*, 161 Ariz. 237, 778 P.2d 602 (1988). The court agreed with Fulminante that his confession to Sarivola should have been suppressed because it was rendered involuntary by Sarivola's promise to protect Fulminante

from other inmates. 161 Ariz. at 244, 778 P.2d at 609. The court held, however, that the admission of the confession was harmless beyond a reasonable doubt because it was cumulative to his second confession to Donna Sarivola, which "established his guilt." 161 Ariz. at 245, 778 P.2d at 610. The court found that the physical evidence in the case corroborated the confession to Donna Sarivola. 161 Ariz. at 245-46, 778 P.2d at 610-11. The court specifically rejected Fulminante's claim that his confession to Donna Sarivola should have been suppressed based upon the "fruit of the poisonous tree" doctrine. 161 Ariz. at 246, 778 P.2d at 611.

Fulminante filed a timely motion for reconsideration, which the court granted. (Appendices to Petition for Writ of Certiorari at B-1.) The court then issued a supplemental opinion reversing Fulminante's conviction. 161 Ariz. at 261, 778 P.2d at 626. The Arizona Supreme Court reversed its previous determination that admission of Fulminante's coerced confession to Sarivola was harmless error, stating that federal constitutional law "compels us to conclude that the receipt of the original coerced confession may not be considered harmless error." 161 Ariz. at 262, 778 P.2d at 627.

Justice Cameron dissented from the majority opinion on the ground that "changes in the law now allow the harmless error doctrine to be applied to coerced but reliable confessions." 161 Ariz. at 263, 778 P.2d at 628.

Following denial of a timely motion for reconsideration, the state filed for a writ of certiorari on November 17, 1989. (Appendices to Petition for Writ of Certiorari at

D-1.) This Court granted the petition for writ of certiorari on March 26, 1990.

SUMMARY OF ARGUMENTS

In determining that Fulminante's confession to Sarivola was rendered involuntary by Sarivola's promise of protection, the Arizona Supreme Court misconstrued this Court's decision in *Bram v. United States*, 168 U.S. 532 (1897). The court misread *Bram* as requiring a simple "but for" analysis where a confession follows a promise. Although the court acknowledged that the proper test to be applied in determining voluntariness of a confession is the "totality of circumstances" test,[4] it is evident that the court failed to apply the correct test, as it made no finding that Fulminante's will was overborne by Sarivola's promise of protection.

When the "totality of circumstances" test is applied to Fulminante's confession to Sarivola, it is apparent that the promise of protection did not overbear Fulminante's will and render his subsequent confession involuntary. Fulminante is a middle-aged hardened criminal, whose will could not be easily overborne. Although other inmates in the prison had been giving Fulminante a hard time because of the rumor that he was a child-killer, he never indicated to Sarivola that he was in fear of the other inmates. Further, Fulminante never asked Sarivola for protection, although he thought Sarivola still had connections with organized crime and would have been

[4] *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)

able to protect him. The confession was the product of Fulminante's free will.

Even assuming, *arguendo*, that Fulminante's confession was coerced by Sarivola's promise of protection, reversal of his murder conviction was unwarranted. The erroneous admission of a coerced confession should not mandate reversal if it can be said, beyond a reasonable doubt, that the error was harmless. *Chapman v. California*, 386 U.S. 18, 24 (1967). Although this Court has previously stated that admission of a coerced confession can never be harmless error, it is just the sort of evidentiary error that readily lends itself to a harmless-error analysis. *See Satterwhite v. Texas*, 486 U.S. 249, ___, 108 S. Ct. 1792, 1798 (1988).

Concerns about the reliability of coerced confessions and their effect on the jurors do not warrant exempting the erroneous admission of a coerced confession from a harmless-error analysis. Neither do concerns that admission of a coerced confession may have the appearance of denying a defendant his right to a fair trial. Further, application of a harmless-error analysis will not undermine efforts to deter unlawful government conduct.

Application of a harmless-error analysis to coerced confessions is consistent with the basic purpose of a criminal trial, which is to determine guilt or innocence. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Continued adherence to the rule requiring automatic reversal in a case where a coerced confession is erroneously admitted in evidence results in subverting the basic purpose of a criminal trial at a substantial cost to society. *United States v Mechanik*, 475 U.S. 66, 72 (1986). In Fulminante's

case, the state is required to afford him a new trial, even though there was no egregious government misconduct and even though the Arizona Supreme Court determined, beyond a reasonable doubt, that admission of the coerced confession was harmless error.

ARGUMENTS

I

FULMINANTE'S CONFESSION TO AN INMATE INFORMANT WAS VOLUNTARY, AND ITS ADMISSION IN EVIDENCE DID NOT VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS.

The first question presented to this Court is whether the Arizona Supreme Court erred as a matter of federal constitutional law in determining that Fulminante's confession to Sarivola was involuntary. As this Court noted in *Miller v. Fenton*, 474 U.S. 104, 110 (1985):

> Without exception, the Court's confession cases hold that the ultimate issue of "voluntariness" is a legal question requiring independent federal determination.

This Court makes an independent evaluation of a state court's determination of voluntariness based upon the undisputed facts of the case. *Stroble v. California*, 343 U.S. 181, 190 (1952).

A. When A Defendant Objects To The Admission Of His Confession, The Trial Court Is Required To Determine Its Voluntariness Based Upon The Totality Of Circumstances Test.

The Fifth Amendment prohibition against compelled testimony and the due process clause of the Fourteenth

Amendment both forbid the admission in evidence of a defendant's involuntary, or coerced, confession. *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Malloy v. Hogan*, 378 U.S. 1, 6-7 (1964). A defendant has a constitutional right to object to the admission of a confession that he claims is involuntary, and he is entitled to a "fair hearing and reliable determination on the issue of voluntariness" by the trial court prior to admission in evidence of his confession. *Jackson v. Denno*, 378 U.S. at 376-77. At the voluntariness hearing, the burden is on the state to prove, at least by a preponderance of the evidence, that the confession was voluntarily made. *Lego v. Twomey*, 404 U.S 477, 489 (1972).

Pursuant to *Schneckloth v. Bustamonte*, 412 U.S. at 225, in addressing the question whether a confession is voluntary, the court must determine if the confession is "the product of an essentially free and unconstrained choice by its maker." The confession must not be "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence." *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (per curium) (brackets in original), quoting *Bram v. United States*, 168 U.S at 542-43.

It has long been recognized that an involuntary confession may be exacted as a result of psychological as well as physical coercion. As noted in *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960):

> A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion."

The ultimate question is whether the pressure, in whatever form, was sufficient to cause an accused's will to be overborne and his capacity for self-determination to be critically impaired. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

A court's determination regarding voluntariness must be reached in light of the "totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. at 226. A court may not find that a confession is involuntary unless it first finds the presence of "coercive police activity." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

Under Arizona procedures, the trial court determines issues regarding the voluntariness of a confession out of the presence of the jurors. A.R.S. § 13-3988(A). Once a defendant challenges the voluntariness of his confession, the state is required to prove, by a preponderance of the evidence, that the confession was freely and voluntarily made, and that it was not the result of physical or psychological coercion. *State v. Osbond*, 128 Ariz. 76, 78, 623 P.2d 1232, 1234, *cert. denied*, 454 U.S. 846 (1981). In determining the voluntariness of confessions, Arizona courts look to the totality of circumstances in deciding whether the will of a defendant has been overborne. *State v. Jordan*, 137 Ariz. 504, 506, 672 P.2d 169, 171 (1983). In order for a promise to render a confession involuntary, the defendant must have relied on the promise when confessing. *State v. Hall*, 120 Ariz. 454, 457, 586 P.2d 1266, 1269 (1978). An appellate court will not overturn the trial court's determination of voluntariness absent a finding of clear and manifest error. *State v. Hall*, 120 Ariz. at 456, 586

P.2d at 1268. In determining if the state carried its burden of proof regarding voluntariness, the appellate court examines the entire record. *State v. Thomas*, 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986).

B. The Arizona Supreme Court Applied An Incorrect Test In Overruling The Trial Court's Determination Of Voluntariness.

Although the Arizona Supreme Court noted in its initial opinion that it was required to apply the "totality of circumstances" test in determining whether the trial court's finding of voluntariness was clear and manifest error, it ignored that requirement in addressing the voluntariness issue. The Arizona Supreme Court agreed with Fulminante that Sarivola's promise of protection was "extremely coercive" because the "obvious" inference from the promise was that Fulminante's life would be in jeopardy if he did not confess. 161 Ariz. at 243, 778 P.2d at 608. Instead of then determining whether Fulminante's will was overborne by Sarivola's promise of protection, the court merely applied a "but for" test and concluded that the promise rendered the confession involuntary. 161 Ariz. at 244, 778 P.2d at 609.

While the Arizona Supreme Court did not acknowledge that it was applying a "but for" test, rather than the "totality of circumstances" test, to assess the effect of Sarivola's promise upon Fulminante's confession, that is exactly what that court did. In concluding that Fulminante's confession was involuntary because it was made following Sarivola's promise of protection, the Arizona Supreme Court cited to this Court's decisions in *Malloy v. Hogan*, 378 U.S. 1, and *Bram v. United States*, 168 U.S. 532. 161 Ariz. at 244, 778 P.2d at 609. The state maintains that the Arizona Supreme Court's action in applying a "but for" test to a promise made in the course of obtaining a confession was based upon its misreading of the *Bram* case.

The state acknowledges that *Bram* could easily be misread to have applied a simple "but for" test; that is to say, if the confession would not have been given but for the promise, then it must be excluded from evidence. 168 U.S. at 549. However, such a test would not take into account the narrower question of compulsion. If this was the holding in *Bram*, it was based upon the rationale that "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner." 168 U.S. at 543.

Bram, however, is not viewed as proscribing the admission of all promise-induced confessions.[5] This Court has expressly recognized that "*Bram* and its progeny did not hold that the *possibly* coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel." *Brady v. United States*, 397 U.S. 742, 754 (1970) (emphasis added). If *Bram* did not hold this, then *Bram* cannot be read as foreclosing any inquiry into

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[5] *Green v. Scully*, 850 F.2d 894, 901-03 (2nd Cir.), *cert. denied*, 109 S. Ct. 374 (1988); *Miller v. Fenton*, 796 F.2d 598, 608-11 (3rd Cir.), *cert. denied sub nom., Miller v. Neubert*, 479 U.S. 989 (1986); *United States v. Shears*, 762 F.2d 397, 401-03 (4th Cir. 1985); *Jarrell v. Balkcom*, 735 F.2d 1242, 1250-51 (11th Cir. 1984), *cert. denied*, 471 U.S. 1103 (1985); *Rachlin v. United States*, 723 F.2d 1373, 1377-78 (8th Cir. 1983); *United States v. Ferrara*, 377 F.2d 16, 17-18 (2nd Cir.), *cert. denied*, 389 U.S. 908 (1967).

the question of compulsion when all that is shown is a "but for" relationship between a statement and a promise.

Further, this Court did not use a "but for" test in *Hutto v. Ross*, 429 U.S. 28, a case decided after this Court held in *Schneckloth v. Bustamonte*, 412 U.S. at 226, that the "totality of circumstances" test was the appropriate test. In its per curium decision in *Hutto*, this Court indicated that it does not matter that an accused confessed because of the promise, so long as the promise did not overbear his will. 429 U.S. at 30.

C. Application Of The Totality Of Circumstances Test To The Undisputed Facts Of This Case Demonstrates That The Trial Court's Determination Of Voluntariness Was Correct.

In its initial opinion, the Arizona Supreme Court held that the trial court did not abuse its discretion in ruling that Fulminante's confession was voluntarily made. This was because Fulminante did not provide the trial court with any evidence at the voluntariness hearing to support his claim that he was in danger, and that Sarivola used that fact to coerce a confession. The state maintains that the Arizona Supreme Court was correct in finding that the trial court did not err in its ruling. However, the Arizona Supreme Court was incorrect in its determination that the trial evidence established that Fulminante's confession was coerced. No evidence that Fulminante's life was in danger was presented at trial.

For the purpose of arguing the voluntariness issue, Fulminante's trial counsel adopted the facts set forth by the prosecutor in the state's response to the motion to suppress. (J.A. at 30-31.) Defense counsel made it clear that Fulminante was not "admitting that any confession was ever made to Sarivola or to his wife, Donna." (J.A. at 31.) During argument, neither defense counsel, nor the prosecutor,[6] alluded to the fact that Fulminante had been receiving rough treatment from the other inmates prior to his confession to Sarivola. However, the trial court was made aware of that fact, as evidenced by an excerpt of Sarivola's defense interview that was attached to Fulminante's Reply to Response on Motion to Suppress. (J.A. at 20, 29.) Thus, although Fulminante did not present any "evidence" at the voluntariness hearing that he was in danger, and that Sarivola used that fact to coerce the confession, the trial court was made fully aware of all of the circumstances surrounding Fulminante's confession to Sarivola. The trial court found that the confession to Sarivola was not "the result of promises, threats, or coercion by the Government or any of its agents," and that it had been voluntarily made. (J.A. at 44, 63.) When the characteristics of the accused, the circumstances of the interrogation, and the conduct of law enforcement officials are taken into consideration, it is readily apparent that the trial court's determination of voluntariness was correct.

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[6] The prosecutor did refer during argument to various statements Sarivola allegedly made to Fulminante to the effect that other inmates might hurt Fulminante if they found out that he was a child killer. (J.A. at 40-42.)

1. Characteristics of the accused.

There is nothing in Fulminante's character traits or background to suggest that he is a man whose will could be easily overborne. At the time of the confession, he was a mature man of average or low average intelligence whose formal education ended when he dropped out of school during the fourth grade. (Adult Probation Department-Presentence Investigation, filed Feb. 4, 1986, Record on Appeal, Photostated Instruments at 88i, 88o.) Although he lacked much in the way of formal education, Fulminante was well-schooled in the intricacies of the criminal justice system. At the age of 44, he had six prior felony convictions, including a 1965 conviction in New Jersey for impairing the morals of a child. (*Id.* at 88, 88h.) He had been imprisoned on three occasions as a result of his felony convictions. (*Id.* at 88.) When he met Sarivola, Fulminante was already a hardened criminal who knew how to take care of himself while in prison.

2. Circumstances of the Interrogation

There was nothing of a coercive nature in the circumstances in which Sarivola questioned Fulminante about Jeneane's death. Although Sarivola was an F.B.I. informant who questioned Fulminante while inside prison, Fulminante was not subjected to the inherently coercive atmosphere of a custodial interrogation.[7] He was unaware that Sarivola was an inmate informant. The two men were on friendly terms, and Fulminante talked to Sarivola about Jeneane's death because he wanted to do

[7] This Court recognized in *Miranda v. Arizona*, 384 U.S. at 458, "the compulsion inherent in custodial surroundings."

so, not because he was under any official compulsion to do so.

3. Conduct of Law Enforcement Officials

It is undisputed that Sarivola was not an agent of the Mesa Police Department, the agency that conducted the investigation of Jeneane's murder. The Mesa police were unaware of Sarivola's existence in 1983, and played no role in Sarivola's questioning of Fulminante. (J.A. at 11.) It is also undisputed that no federal officials were directly involved in Sarivola's attempts to obtain a confession from Fulminante. However, when Sarivola questioned Fulminante, he was acting on Agent Ticano's instructions to find out more about the rumor that Fulminante murdered his stepdaughter. (J.A. at 10.) Thus, the trial court, by implication, determined that Sarivola was a government agent. (J.A. 43-44). The Arizona Supreme Court made an explicit finding to that effect.[8]

Fulminante did not complain that Sarivola engaged in any especially reprehensible conduct in obtaining his confession. However, he argued at the voluntariness hearing, and in his appeal to the Arizona Supreme Court, that Sarivola's promise to protect him from other inmates was "extremely coercive" and compelled him to confess.

While Sarivola's promise of protection could be viewed as objectively coercive, Fulminante's will was not overborne by this promise. Such a promise could well have

[8] In its opinion, the Arizona Supreme Court referred to the fact that Fulminante was questioned by a "government agent." 161 Ariz. at 242, 778 P.2d at 607.

been sufficient inducement to overbear the will of a young, weak, or fearful individual. As this Court noted in *Stein v. New York*, 346 U.S. 156, 185 (1953):

> What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal.

Fulminante, however, was neither young, weak, nor fearful. He was a hardened criminal. Although Sarivola told Fulminante that the other inmates might hurt him if they found out he was a child killer, Fulminante never indicated to Sarivola that he was in fear of the other inmates. Further, he never asked Sarivola for protection, even though he thought Sarivola had ties to organized crime. (J.A. at 10.) In fact, the only concern Fulminante ever expressed to Sarivola was his concern that, when he was released from Raybrook, the Mesa police would continue in their attempts to connect him with Jeneane's murder. (J.A. at 87.)

In finding that the state failed to establish that Fulminante's confession was voluntary, the Arizona Supreme Court specifically stated that the fact that Fulminante never indicated that he feared the other inmates, and that he did not seek Sarivola's protection, was insufficient to establish the voluntariness of his confession. 161 Ariz. at 244, 778 P.2d at 609. The court failed to recognize that the preceding facts showed that Fulminante did not rely on Sarivola's promise of protection. Despite the requirement that when confessing a defendant must rely on a promise before it will render his confession involuntary, the Arizona Supreme Court made no finding that Fulminante relied on Sarivola's promise of protection. Indeed, the

court could not make such a finding because there is nothing in the record that would support it.

Thus, there is absolutely no indication that Fulminante confessed to Jeneane's murder because his will was overborne by Sarivola's promise of protection. Conversely, it appears that he simply chose to confide in Sarivola, a fellow inmate he had come to know and trust. The fact that he chose to confide in a man who later betrayed his confidence does not mean that his confession was involuntary. As Justice Brennan stated in his dissent in *Lopez v. United States*, 373 U.S. 427, 465 (1963):

> The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.

Additionally, when determining the coercive effect of Sarivola's promise of protection, it should be noted that the promise had no bearing on the question whether Fulminante would be treated leniently in a prosecution for Jeneane's death. It was, instead, a promise to help with a collateral problem – the tough treatment Fulminante was receiving from other inmates. As such, it was clearly much less coercive than would have been a promise made by an officer of the Mesa Police Department to treat Fulminante leniently if he would confess to the murder of his stepdaughter. *See Miller v. Fenton*, 796 F.2d at 610.

Moreover, in the situation usually cited where police officers promise a suspect lenient treatment in exchange for a statement, they are really telling the suspect that

they know that he committed the crime he is being questioned about, and that the promised leniency will be forthcoming only if he confesses to that crime. Sarivola, on the other hand, did not condition his promise of help on Fulminante's confession to murder. He told Fulminante that he would help him if Fulminante told him the truth. Thus, Fulminante had to know that Sarivola would still help him, regardless of what he said, if Sarivola believed him. Sarivola's promise of protection was not so coercive that it had the effect of overbearing Fulminante's will and producing a confession that was not an "essentially free and unconstrained choice." *Schneckloth v. Bustamonte*, 412 U.S. at 425.

II. THERE ARE NO VALID REASONS TO EXEMPT THE ADMISSION OF A COERCED CONFESSION FROM A HARMLESS-ERROR ANALYSIS.

After initially affirming Fulminante's murder conviction on the ground that admission of his coerced confession was harmless error beyond a reasonable doubt, the Arizona Supreme Court reversed the conviction in its supplemental opinion, stating:

> It is clear that federal constitutional law, as interpreted, pronounced, and applied by the United States Supreme Court and other federal courts compels us to conclude that the receipt of the original coerced confession may not be considered harmless error.

161 Ariz. at 262, 778 P.2d at 627. In support of its conclusion, the court relied on this Court's opinions in *Mincey v. Arizona*, 437 U.S. at 398, *Chapman v. California*, 386 U.S. at 23 n.8, *Jackson v. Denno*, 378 U.S. at 376, and *Payne v. Arkansas*, 356 U.S. 560, 568 (1958). 161 Ariz. at 261, 778 P.2d at 626.

Prior to its decision in *Chapman*, this Court stated on numerous occasions that the erroneous admission in evidence of a coerced confession could never be harmless error. In 1967, this Court held in *Chapman* that not every constitutional error requires reversal of a defendant's conviction if it may be said that the error was harmless beyond a reasonable doubt. 386 U.S. at 24. Since its decision in *Chapman*, this Court has not had occasion to squarely address the question whether the erroneous admission of a coerced conviction requires reversal in a case where it can be said, beyond a reasonable doubt, that admission of the coerced confession was harmless error.[9] If this Court agrees with the Arizona Supreme Court that Fulminante's confession to Sarivola was coerced, that question is squarely before the Court.

In *Chapman*, the Court indicated in dicta that the erroneous admission in evidence of a coerced confession

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[9] Although *Mincey v. Arizona*, 437 U.S. 385, was decided after *Chapman*, the question whether admission of a coerced confession could be subject to a harmless-error analysis was not an issue in that case. There were two issues before the Court in *Mincey* – whether evidence had been obtained by an unconstitutional search and seizure, and whether the confession was voluntary. After the Court found a Fourth Amendment violation, it found it "appropriate" to consider the voluntariness issue, apparently to give the trial court guidance at the retrial. 437 U.S. at 396. The Court then found that the confession was involuntary. While the Court failed to apply a harmless-error analysis to the involuntary confession, it is not clear that the Court would have refused to do so had it not found that reversal was required based upon the Fourth Amendment violation.

was not subject to a harmless-error analysis because, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23. The *Chapman* Court did not further explain why application of the harmless-error analysis would be inappropriate in a case where a coerced confession has been erroneously admitted in evidence. The state requests this Court to now consider and determine the question whether admission of a coerced confession may be subject to the *Chapman* harmless-error analysis.

A. Concerns Regarding The Reliability Of A Coerced Confession And The Effect It Has On The Jurors Do Not Warrant Exempting Admission Of A Coerced Confession From A Harmless-Error Analysis.

This Court has held that the erroneous admission in evidence of a coerced confession at a state criminal trial violates the due process clause of the Fourteenth Amendment and vitiates a defendant's conviction. *Chambers v. Florida*, 309 U.S. 227, 228 (1940); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936); *Payne v. Arkansas*, 356 U.S. at 561.

In *Stein v. New York*, 346 U.S. at 192, the Court set forth the following reasons for automatically reversing a conviction obtained after admission in evidence of a coerced confession:

> [R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A beaten confession is a false foundation for any conviction . . . .

Apparently this Court was concerned with the possibility that a confession obtained by coercion was inherently unreliable. Undoubtedly, the truth of a confession obtained by physical mistreatment or the threat of physical harm is suspect. However, a confession obtained by police coercion in the form of trickery, deceit, or promises is not necessarily unreliable. If government coercion produces a confession that is actually untruthful, the state will not be able to show that the error in admitting it was harmless, as there would be no overwhelming evidence to establish guilt. Thus, the mere possibility that a coerced confession is unreliable should not exempt it from a harmless-error analysis.

In *Stein*, this Court was also concerned with the evidentiary effect of a confession. 346 U.S. at 192. The introduction in evidence of a confession, coerced or not, may affect the jurors. However, other forms of inadmissible evidence may also affect the jurors. This possibility does not preclude a harmless-error analysis for other types of inadmissible evidence, and should not make the erroneous admission of a coerced confession immune from a harmless-error analysis. This Court stated in *Holloway v. Arkansas*, 435 U.S. 475 (1978):

> In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury.

435 U.S. at 490 (citations omitted); *accord*, *Satterwhite v. Texas*, 486 U.S. at ___, 108 S. Ct. at 1798 (permitting harmless-error analysis "where the evil caused by a Sixth

Amendment violation is limited to the erroneous admission of particular evidence").

In *Milton v. Wainwright*, 407 U.S. 371, 372 (1972),[10] this Court held that the erroneous admission of a confession obtained in violation of a defendant's Sixth Amendment right to counsel is subject to a harmless-error analysis. This Court has also held that the erroneous admission of a non-testifying co-defendant's confession in violation of *Bruton v. United States*, 391 U.S. 123 (1968), is not immune from a harmless-error analysis. *Harrington v. California*, 395 U.S. 250, 254 (1969). Because admission of such confessions would arguably have the same effect on the jurors as the admission of a coerced confession, the concern with its evidentiary effect does not justify exempting a coerced confession from a harmless-error analysis.

[10] Because the defendant in *Milton* also challenged his confession on the ground that it was involuntary, the following circuit courts and state courts have held that allegedly involuntary confessions are not immune from a harmless-error analysis: *United States v. Carter*, 804 F.2d 487 (8th Cir. 1986); *United States v. Murphy*, 763 F.2d 202 (6th Cir. 1985), *cert. denied sub nom., Stauffer v. United States*, 474 U.S. 1063 (1986); *Harrison v. Owen*, 682 F.2d 138 (7th Cir. 1982); *State v. Childs*, 430 N.W.2d 353 (Wis. App. 1988), *cert. denied*, 109 S. Ct. 1154 (1989); *State v. Dean*, 363 S.E.2d 467 (W.Va. 1987); *Hinshaw v. State*, 398 So. 2d 762 (Ala. 1981).

B. Concerns That The Erroneous Admission Of A Coerced Confession May Have The Appearance Of Denying A Defendant His Right To A Fair Trial Do Not Warrant Exempting A Coerced Confession From A Harmless-Error Analysis.

The admission of a coerced confession may have the appearance of denying a defendant his fundamental right to a fair trial. The mere appearance that a defendant has been denied his right to a fair trial does not justify exempting coerced confessions from a harmless-error analysis. If the mere appearance of unfairness is a valid reason for exempting evidence obtained in violation of a defendant's constitutional rights from a harmless-error analysis, then admission of other illegally-obtained evidence would be exempt from a harmless-error analysis. However, this Court has held that the erroneous admission of evidence seized in violation of the Fourth Amendment, *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968), and of confessions obtained in violation of the Sixth Amendment are, in fact, subject to a harmless-error analysis. *Milton v. Wainwright*, 407 U.S. at 372.

As this Court stated in *Stein v. New York*, 346 U.S. at 192:

> Coerced confessions are not more stained with illegality than other evidence obtained in violation of the law.

That being the case, the mere appearance that a defendant has been denied a fair trial because his coerced confession has been introduced in evidence against him

does not warrant refusing to apply a harmless-error analysis. Where the state can establish that a defendant did have a fair trial, and that the coerced confession did not contribute to the verdict of guilt, the conviction should stand.

C. Application Of A Harmless-Error Analysis To The Erroneous Admission Of A Coerced Confession Is Consistent With The Central Purpose Of A Criminal Trial And Will Not Undermine The Deterrent Effect Of Exclusionary Rules.

This Court stated in *Delaware v. Van Arsdall*:

> The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

475 U.S. at 681 (citations omitted). The *Van Arsdall* Court recognized that there are some constitutional errors, such as the denial of the right to counsel and the denial of the right to an impartial trier-of-fact, that are so fundamental and pervasive that they mandate reversal regardless of the facts or circumstances of the case. 475 U.S. at 681-82; *accord, Rose v. Clark*, 478 U.S. 570, 579 (1986).[11]

[11] The Court did note in *Rose v. Clark*, 478 U.S. at 578, n. 6, that the *Chapman* Court cited use of a coerced confession as an error that could never be harmless because it "aborted the basic trial process."

Clearly, the erroneous admission of a coerced confession is a serious violation of the Fifth and Fourteenth Amendments. However, it is not a violation that can be said to so infect the entire trial that it should automatically vitiate a conviction obtained after an otherwise fair trial. Application of the harmless-error analysis to the erroneous admission of a coerced confession comports with the central purpose of a criminal trial.

Although exclusionary rules keep reliable and relevant evidence from the jurors and deflect a criminal trial from its central purpose,[12] the reason for excluding coerced confessions is to curb police conduct that is "revolting to the sense of justice," *Miller v. Fenton*, 474 U.S. at 109 (quoting *Brown v. Mississippi*, 297 U.S. at 286); and "to substantially deter future violations of the Constitution," *Colorado v. Connelly*, 479 U.S. at 167. The preceding purposes for excluding coerced confessions will not be undermined if this Court holds that the erroneous admission of a coerced confession is subject to a harmless-error analysis.

D. The Facts And Circumstances Of Fulminante's Case Demonstrate Why The Harmless-Error Analysis Should Be Applied To The Erroneous Admission Of Coerced Confessions.

Turning to the facts and circumstances of the present case, it is clear that any concern regarding the reliability

[12] This Court has noted that the prohibition against admission of a coerced confession keeps "reliable and probative evidence" from a jury. *Michigan v. Harvey*, ___ U.S. ___, 110 S. Ct. 1176, 1181 (1990). *See Colorado v. Connelly*, 479 U.S. at 166.

of Fulminante's confession to Sarivola is unwarranted. Fulminante's second, and undeniably voluntary, confession to Donna Sarivola demonstrates the reliability of the confession to Sarivola. Any concern whether admission of Fulminante's coerced confession to Sarivola had an undue effect on the jurors is also unwarranted. Since evidence of Fulminante's second confession to Donna Sarivola was introduced in evidence, his first confession was cumulative evidence.

It cannot be said that introduction of Fulminante's first confession had the appearance of denying him his right to a fair trial. This was a situation where the question of coercion was extremely close. This is evidenced by the fact that the Arizona Supreme Court found that the trial court did not abuse its discretion in denying Fulminante's motion to suppress his confession to Sarivola. After reviewing the trial record, however, the Arizona Supreme Court found that the confession was coerced by Sarivola's promise of protection. It appears that the court's finding of involuntariness was based upon the state's failure to prove that the promise of protection did not coerce the confession, as Fulminante never testified that he confessed in reliance upon Sarivola's promise of protection. In any event, this was not a situation where a confession has been wrung from a defendant by government conduct that shocks the conscience.

Refusing to apply a harmless-error analysis in a case such as this is not necessary in order to deter any egregious police misconduct, as there was none. Neither Agent Ticano of the F.B.I. nor any member of the Mesa Police Department instructed Sarivola to use coercive tactics to obtain a confession from Fulminante. Sarivola

was not placed in prison for the purpose of obtaining incriminating statements from Fulminante. He was in Raybrook for the same reason Fulminante was there – both had been convicted of federal offenses. Sarivola and Fulminante met by chance. Further, although Sarivola's promise of protection was objectively coercive, it does not rise to the level of conduct that has been condemned by this Court on the basis that it is revolting or shocking to the conscience.

The central purpose of Fulminante's trial was to determine his guilt or innocence of the murder of his stepdaughter. In its initial opinion, the Arizona Supreme Court applied a harmless-error analysis to the erroneous admission of Fulminante's coerced confession to Sarivola. The court determined that, under *Chapman* or any other harmless-error test, admission of the coerced confession was harmless error beyond a reasonable doubt. Requiring automatic reversal of a conviction where erroneously-admitted evidence has not had any effect whatsoever on the jury's determination of guilt does not comport with the central purpose of a criminal trial.

Even if there are a number of valid reasons that would support this Court's continued adherence to its previously-expressed dicta that admission of a coerced confession is not subject to a harmless-error analysis, those reasons should be reexamined. As this Court stated in *United States v. Mechanik*:

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken

place; victims may be asked to relive their disturbing experiences. The "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." Thus, while reversal "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution," and thereby "cost society the right to punish admitted offenders." Even if a defendant is convicted in a second trial, the intervening delay may compromise society's "interest in the prompt administration of justice," and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.

> But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.

475 U.S. at 72 (citations omitted). Although the error at issue in *Mechanik* was not an error of constitutional dimension the costs to society are the same whether the error is constitutional or non-constitutional.

CONCLUSION

Arizona requests this Court to reverse the supplemental opinion of the Arizona Supreme Court, in which that court held that Fulminante's confession was coerced and that the court was precluded by federal constitutional law from applying a harmless-error analysis to its admission.

Respectfully submitted,

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